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No. 89-478

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF MARYLAND,

*Petitioner,*

v.

SANDRA ANN CRAIG,

*Respondent.*

**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND**

## BRIEF FOR PETITIONER

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## QUESTION PRESENTED

Where case-specific findings regarding the need to protect child victims are made and the witnesses, ages four to six, are subjected to cross-examination at trial, does the Sixth Amendment's Confrontation Clause require a face-to-face meeting between the witnesses and the accused before a one-way closed-circuit television procedure is used?

## PARTIES

The caption contains the names of all the parties below.



## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| PARTIES | ii |
| OPINIONS BELOW | 1 |
| STATEMENT OF JURISDICTION | 1 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | 2 |
| STATEMENT OF THE CASE | 4 |
| SUMMARY OF ARGUMENT | 14 |
| ARGUMENT | 15 |
| WHERE CASE-SPECIFIC FINDINGS REGARDING THE NEED TO PROTECT CHILD VICTIMS ARE MADE AND THE WITNESSES, AGES FOUR TO SIX, ARE SUBJECTED TO CROSS-EXAMINATION AT TRIAL, THE SIXTH AMENDMENT'S CONFRONTATION CLAUSE DOES NOT REQUIRE A FACE-TO-FACE MEETING BETWEEN THE WITNESSES AND THE ACCUSED BEFORE A ONE-WAY CLOSED-CIRCUIT TELEVISION PROCEDURE IS USED | 15 |
| A. Child abuse prosecutions present unique problems, and the States have responded by enacting various child-protective procedures | 15 |
| B. The Confrontation Clause should not be construed literally | 18 |
| C. Maryland's one-way closed-circuit television procedure furthers the public interests of protecting children and of effective law enforcement, and the need to use the procedure in this case was amply established | 21 |

1. Several compelling interests are furthered by the use of the one-way closed-circuit television procedure ..... 21
2. The use of one-way closed-circuit television by the child victims was based on appropriate case-specific findings of necessity ..... 27
3. The decision of the Court of Appeals of Maryland misconstrues the Confrontation Clause ..... 29

CONCLUSION ..... 32



## TABLE OF AUTHORITIES

**Cases:** Page

*Baltimore City Department of Social Services v. Bouknight*, 58 U.S.L.W. 4184 (U.S. Feb. 20, 1990) ..... 22
*Barber v. Page*, 390 U.S. 719 (1968) ..... 18
*Barker v. Wingo*, 407 U.S. 514 (1972) ..... 20
*Batson v. Kentucky*, 476 U.S. 79 (1986) ..... 25
*Blanton v. City of North Las Vegas*, 489 U.S. ___, 109 S.Ct. 1289 (1989) ..... 20
*Bourjaily v. United States*, 483 U.S. 171 (1987) ... 19,25
*Brady v. State*, 540 N.E.2d 59 (Ind. Ct. App. 1989) ..... 23
*California v. Green*, 399 U.S. 149 (1970) ..... 20
*Chambers v. Mississippi*, 410 U.S. 284 (1973) ..... 25,31
*Coy v. Iowa*, 487 U.S. ___, 108 S.Ct. 2798 (1988) ..... *passim*
*Craig v. State*, 316 Md. 551, 560 A.2d 1120 (1989) ..... *passim*
*Craig v. State*, 76 Md. App. 250, 544 A.2d 784 (1988) ..... 1,13,24
*Davis v. Alaska*, 415 U.S. 308 (1974) ..... 20
*Delaware v. Fensterer*, 474 U.S. 15 (1985) (per curiam) ..... 20
*Delaware v. Van Arsdall*, 475 U.S. 673 (1986) ..... 20
*Dowdell v. United States*, 221 U.S. 325 (1911) ..... 19
*Dutton v. Evans*, 400 U.S. 74 (1970) ..... 20,29
*FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) ..... 22
*Ginsberg v. New York*, 390 U.S. 629 (1968) ..... 22
*Glendening v. State*, 536 So.2d 212 (Fla. 1988), *cert. denied*, ___U.S. ___, 109 S.Ct. 3219 (1989) ... 22
*Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) ..... 22,27,28,29

## Table of Authorities Continued


| | Page |
|---|---|
| *Hayes v. Missouri*, 120 U.S. 68 (1887) | 25 |
| *Holland v. Illinois*, 493 U.S. ___, 110 S.Ct. 803 (1990) | 20,25 |
| *James v. Illinois*, 493 U.S. ___, 110 S.Ct. 648 (1990) | 25 |
| *Kentucky v. Stincer*, 482 U.S. 730 (1987) | 13,31 |
| *Kirby v. United States*, 174 U.S. 47 (1899) | 19 |
| *Lee v. Illinois*, 476 U.S. 530 (1986) | 25 |
| *Marshall v. Lonberger*, 459 U.S. 422 (1983) | 31 |
| *Mattox v. United States*, 156 U.S. 237 (1895) | 18,19 |
| *Morris v. Slappy*, 461 U.S. 1 (1983) | 24 |
| *Motes v. United States*, 178 U.S. 458 (1900) | 19 |
| *Nelson v. Farrey*, 874 F.2d 1222 (7th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 835 (1990) | 26 |
| *Ohio v. Roberts*, 448 U.S. 56 (1980) | *passim* |
| *Olden v. Kentucky*, 488 U.S. ___, 109 S.Ct. 480 (1988) (per curiam) | 20 |
| *Ortiz v. State*, 188 Ga. App. 532, 374 S.E.2d 92, *cert. denied*, 188 Ga. App. 912 (1988) | 22 |
| *Patterson v. New York*, 432 U.S. 197 (1977) | 31 |
| *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) | 16,22 |
| *People v. Cintron*, ___ N.Y.2d ___, ___ N.Y.S.2d ___, ___ N.E.2d ___ (1990) | 23 |
| *People v. Thomas*, 770 P.2d 1324 (Colo. Ct. App. 1988) (cert. granted by Colo. Sup. Ct. on March 13, 1989) | 22 |
| *Perry v. Leeke*, 488 U.S. ___, 109 S.Ct. 594 (1989) | 20,26 |
| *Pointer v. Texas*, 380 U.S. 400 (1965) | 19 |
| *Prince v. Massachusetts*, 321 U.S. 158 (1943) | 21 |
| *Richardson v. Marsh*, 481 U.S. 200 (1987) | 24 |




## Table of Authorities Continued


| | Page |
|---|---|
| *Rock v. Arkansas*, 483 U.S. 44 (1987) | 29 |
| *Salinger v. United States*, 272 U.S. 542 (1926) | 19 |
| *Snyder v. Massachusetts*, 291 U.S. 97 (1934) | 19,25 |
| *State v. Bonello*, 210 Conn. 51, 554 A.2d 277, *cert. denied*, ___ U.S. ___, 109 S.Ct. 2103 (1989) | 22 |
| *State v. Chisholm*, 245 Kan. 145, 777 P.2d 753 (1989) | 23 |
| *State v. Conklin*, 444 N.W.2d 268 (Minn. 1989) | 23 |
| *State v. Crandall*, 231 N.J. Super. 124, 555 A.2d 35, *cert. granted*, 117 N.J. 143, 564 A.2d 866 (1989) | 23 |
| *State v. Eastham*, 39 Ohio St.3d 307, 530 N.E.2d 409 (1988) | 23 |
| *State v. Hoversten*, 437 N.W.2d 240 (Iowa), *cert. denied*, ___ U.S. ___, 110 S.Ct. 212 (1989) | 23 |
| *State v. Murray*, 375 S.E.2d 405 (W. Va. 1988) | 23 |
| *State v. Presley*, 542 So.2d 1171 (La. App. 1989) | 23 |
| *State v. Sheppard*, 197 N.J. Super. 411, 484 A.2d 1330 (1984) | 26 |
| *State v. Tafoya*, 108 N.M. 1, 765 P.2d 1183 (Ct. App.), *cert. denied*, 107 N.M. 785, 765 P.2d 758 (1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1572 (1989) | 23 |
| *State v. Taylor*, 562 A.2d 445 (R.I. 1989) | 23 |
| *State v. Thomas*, 150 Wis.2d 374, 442 N.W.2d 10, *cert. denied*, ___ U.S. ___, 110 S.Ct. 188 (1989) | 23 |
| *State v. Vincent*, 159 Ariz. 418, 768 P.2d 150 (1989) | 22 |
| *Taylor v. Illinois*, 484 U.S. 400 (1988) | 20,30 |
| *Tennessee v. Street*, 471 U.S. 409 (1985) | 25 |
| *United States v. Hasting*, 461 U.S. 499 (1983) | 24 |

## Table of Authorities Continued


| | Page |
|---|---|
| *United States v. Havens*, 446 U.S. 620 (1980) | 25 |
| *United States v. Inadi*, 475 U.S. 387 (1986) | 20,25,26 |
| *United States v. Owens*, 484 U.S. 554 (1988) | 20,25 |
| *West v. Louisiana*, 194 U.S. 258 (1904) | 19 |
| *Wildermuth v. State*, 310 Md. 496, 530 A.2d 275 (1987) | 12 |
| *Williams v. Florida*, 399 U.S. 78 (1970) | 32 |
| **Constitutional Provisions:** | |
| United States Constitution: | |
| Sixth Amendment | *passim* |
| Fourteenth Amendment | 19 |
| Maryland Declaration of Rights: | |
| Article 21 | 13 |
| **Statutes:** | |
| 28 U.S.C. § 1257 | 2 |
| Ala. Code § 15-25-3 (Supp. 1988) | 17 |
| Alaska Stat. § 12.45.046 (Supp. 1988) | 17 |
| Ariz. Rev. Stat. Ann. § 13-4253 (Supp. 1988) | 17 |
| Cal. Penal Code § 1347 (West Supp. 1989) | 17 |
| Conn. Gen. Stat. Ann. § 54-86g (West Supp. 1989) (amended by Conn. Pub. Act 89-177 (1989)) | 17 |
| Fla. Stat. § 92.54 (West Supp. 1989) | 17 |
| Ga. Code Ann. § 17-8-55 (Supp. 1989) | 17 |
| Idaho Code § 19-3024A (1989) | 17 |
| Ill. Ann. Stat. ch. 38, para. 106A-3 (Smith-Hurd Supp. 1989) | 17 |
| Ind. Code Ann. § 35-37-4-8 (Burns Supp. 1989) | 17 |
| Iowa Code Ann. § 910A.14 (West Supp. 1989) | 17 |




## Table of Authorities Continued


| | Page |
|---|---|
| Kan. Stat. Ann. § 22-3434 (1988) | 17 |
| Ky. Rev. Stat. Ann. § 421.350 (Baldwin Supp. 1989) | 17 |
| La. Rev. Stat. Ann. § 15:283 (West Supp. 1989) | 17 |
| Md. Cts. & Jud. Proc. Code Ann. § 9-102 (1989 Repl. Vol.) | *passim* |
| Mass. Gen. Laws Ann. ch. 278, § 16D (West Supp. 1989) | 17 |
| Mich. Comp. Laws Ann. § 600.2163a (West 1988) | 17 |
| Minn. Stat. Ann. § 595.02 (West 1988) | 17 |
| N.J. Stat. Ann. § 2A:84A-32.4 (West Supp. 1989) | 17 |
| N.Y. Crim. Proc. Law §§ 65.00-.30 (McKinney Supp. 1989) | 17 |
| Ohio Rev. Code Ann. § 2907.41 (Page 1987) | 17 |
| Okla. Stat. Ann. tit. 22, § 753 (West Supp. 1989) | 17 |
| Pa. Cons. Stat. Ann. tit. 42, § 5985 (Purdon Supp. 1989) | 17 |
| R.I. Gen. Laws § 11-37-13 (Supp. 1988) | 17 |
| Tex. Crim. Proc. Code Ann. art. 38.071 (Vernon Supp. 1989) | 17 |
| Utah Code Ann. § 77-35-15.5 (Supp. 1989) | 17 |
| Va. Code Ann. § 18.2-67.9 (1988) | 17 |
| **Rules:** | |
| Fed. R. Evid. 803(1)-(2) | 31 |
| Haw. R. Evid. 616 | 17 |
| Vt. R. Evid. 807 | 17 |

## Table of Authorities Continued


Page

**Miscellaneous:**

American Association for Protecting Children, *Highlights of Official Child Neglect and Abuse Reporting 1985* (1987) ..... 15

American Bar Association, *Guidelines for the Fair Treatment of Child Witnesses in Cases Where Child Abuse Is Alleged* (1985) ..... 16

Bjerregaard, *Televised Testimony as an Alternative in Child Sexual Abuse Cases*, 25 Crim. L. Bull. 164 (1989) ..... 16,26

Foreman, *To Keep the Balance True: The Case of* Coy v. Iowa, 40 Hastings L.J. 437 (1989) ..... 16

Hill & Hill, *Videotaping Children's Testimony: An Empirical View*, 85 Mich. L. Rev. 809 (1987) ..... 16,26

Parker, *The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?*, 17 New. Eng. L. Rev. 643 (1982) ..... 16

Smith, *The Young Victim as Witness for the Prosecution: Another Form of Abuse?*, 89 Dick. L. Rev. 721 (1985) ..... 16,26

*The Supreme Court, 1987 Term: Leading Cases*, 102 Harv. L. Rev. 143 (1988) ..... 26

Note, *Sexually Abused Children: The Best Kept Legal Secret*, 3 N.Y.L. Sch. Hum. Rts. Ann. 441 (1986) ..... 16

S. 1923, 101st Cong., 1st Sess. (1989) ..... 17

S. 1965, 101st Cong., 1st Sess. (1989) ..... 17


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## BRIEF FOR PETITIONER

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### OPINIONS BELOW

The opinion of the Court of Appeals of Maryland is reported, *Craig v. State*, 316 Md. 551, 560 A.2d 1120 (1989), and is reproduced in the petition for writ of certiorari. (Pet. App. 1a-21a).

The opinion of the Court of Special Appeals of Maryland is reported, *Craig v. State*, 76 Md. App. 250, 544 A.2d 784 (1988), and is reproduced in the petition for writ of certiorari. (Pet. App. 22a-69a).

### STATEMENT OF JURISDICTION

The opinion of the Court of Appeals of Maryland reversing Respondent Sandra Ann Craig's convictions

was filed on July 24, 1989. The petition for writ of certiorari was filed on September 22, 1989, and was granted on January 16, 1990. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VI provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . . "

Section 9-102 of the Courts and Judicial Proceedings Article of the Annotated Code of Maryland (1989 Repl. Vol.) provides:

> (a)(1) In a case of abuse of a child as defined in § 5-701 of the Family Law Article or Article 27, § 35A of the Code, a court may order that the testimony of a child victim be taken outside the courtroom and shown in the courtroom by means of closed circuit television if:
>
> (i) The testimony is taken during the proceeding; and
>
> (ii) The judge determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.
>
> (2) Only the prosecuting attorney, the attorney for the defendant, and the judge may question the child.



> (3) The operators of the closed circuit television shall make every effort to be unobtrusive.
>
> (b)(1) Only the following persons may be in the room with the child when the child testifies by closed circuit television:
>
> (i) The prosecuting attorney;
>
> (ii) The attorney for the defendant;
>
> (iii) The operators of the closed circuit television equipment; and
>
> (iv) Unless the defendant objects, any person whose presence, in the opinion of the court, contributes to the well-being of the child, including a person who has dealt with the child in a therapeutic setting concerning the abuse.
>
> (2) During the child's testimony by closed circuit television, the judge and the defendant shall be in the courtroom.
>
> (3) The judge and the defendant shall be allowed to communicate with the persons in the room where the child is testifying by any appropriate electronic method.
>
> (c) The provisions of this section do not apply if the defendant is an attorney pro se.
>
> (d) This section may not be interpreted to preclude, for purposes of identification of a defendant, the presence of both the victim and the defendant in the courtroom at the same time.

## STATEMENT OF THE CASE

From August, 1981, through July, 1986, Respondent Sandra Ann Craig operated a group day-care center in Howard County, Maryland. (Tr. 3/18/87, at 25-29). In October, 1986, Craig was indicted for child abuse, first and second degree sexual offenses, perverted sexual practice, assault, and battery. (J.A. 1; R. 1-6). The named victim in each count was Brooke Etze, a six-year-old child who had attended Craig's center from August, 1984, through June, 1986. (R. 1-6; Tr. 3/16/87, at 144).[1]

In January of 1987, two months before Craig's trial, the State moved to invoke the Maryland procedure whereby a child abuse victim may testify at trial by one-way closed-circuit television. (J.A. 3-4).[2] The State sought to use this procedure for Brooke and other children whom Craig was charged with abusing.[3] At

[1] Both the transcript of Brooke Etze's competency evaluation and the petition for writ of certiorari erroneously refer to Brooke as a seven-year old. (J.A. 74; Pet. i, 4, 16). The videotape of Brooke's competency evaluation and the transcript of Brooke's trial testimony both reflect that Brooke said she was six years old. (Court Exhibit 1: J.A. 160; J.A. 92). Brooke's mother confirmed this when she testified that Brooke had been adopted from Korea and that, as best as could be determined, Brooke was born on April 11, 1980. (Tr. 3/16/87, at 141-43).

[2] Section 9-102 of the Courts and Judicial Proceedings Article of the Maryland Code requires that a judge first determine "that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate." Md. Cts. & Jud. Proc. Code Ann. § 9-102(a)(1)(ii) (1989 Repl. Vol.).

[3] Sandra Craig was named in twelve additional indictments charging child abuse and related crimes. (Tr. 12/11/86, at 10, 13). Craig's son, Jamal, also was charged with having abused



a two-day pre-trial hearing on the State's motion, experts testified in detail about the trauma Brooke and each of four other child victims would suffer if compelled to testify in front of Craig at trial.[4] Craig was present at this hearing, and her counsel cross-examined the witnesses about their expert qualifications and their testimony. (J.A. 7-69).

Mary Burke, a child therapist with the Howard County Sexual Assault Center,[5] testified that she had conducted twenty counseling sessions with Brooke Etze, each lasting one to one and one-half hours. (J.A. 29, 38). When asked whether Brooke would be able to "testify face to face with Mrs. Craig," Ms. Burke said that "it would be very difficult if not impossible for Brooke to sit in the same room with Mrs. Craig and discuss the alleged abuse incidents." (J.A. 39).

some of the same children who were the subjects of indictments against Craig. (Tr. 1/20/87, at 77; Tr. 1/21/87, at 28-29). Although trial in this case proceeded only on the indictment involving abuse of Brooke Etze by Sandra Craig (Tr. 1/7/87, at 3), the State's motion for use of closed-circuit television by child victims, and the pre-trial hearing on that motion, addressed a total of eleven children (J.A. 3-4; Tr. 1/20/87, at 30-100; Tr. 1/21/87, at 2-69). Some of these victims claimed to have been abused by both Sandra and Jamal Craig. (Tr. 1/20/87, at 77; Tr. 1/21/87, at 28-29).

[4] Of the eleven victims that were the subject of the pre-trial hearing, the State will discuss the four children who testified via closed-circuit television in this case, as well as a fifth child whom the State called as a witness, but who was unable to testify.

[5] Ms. Burke held a Bachelor's Degree in Child Behavior and Development and a Master's Degree in Counseling Psychology and Human Development. (J.A. 30-31). She had been working full time with abused children since 1981, providing victims and their families with counseling and support services. (J.A. 31-32).

In explaining the basis for her opinion, Ms. Burke said that Brooke perceives "that she was threatened by Mrs. Craig and that she feels that her life is in jeopardy and part of her family and the household pet." (J.A. 39). Ms. Burke also commented that Brooke "truly believes that those threats will be carried out against her." (J.A. 39).

In addition to saying that, if faced with Craig and others, Brooke "would be unable to talk about what happened to her," Ms. Burke stated that Brooke "currently in preparation for the pending hearings is experiencing disruption in her breathing which is definitely manifesting distress and fear and anxiety visible in a physical manner and also an emotional manner." (J.A. 39-40). On cross-examination, Ms. Burke added that Brooke would probably stop talking, withdraw, and curl up in a ball if she were forced to testify in Craig's presence. (J.A. 44).

Ms. Burke also testified with regard to two other child victims, Justin Peeples and Jessie Sue Smith. She related that she had seen Justin, age four,[6] approximately eighteen times for counseling. (J.A. 40). She said that Justin "would have great difficulty talking in front of people, particularly in front of Mrs. Craig, whom he sees as a threatening figure." (J.A. 41). Ms. Burke also explained that Justin has difficulty discussing his abuse by Craig, and in particular "tends to change the subject which is his manner of avoiding the issue." (J.A. 41). He also "becomes agitated and depressed, . . . bursts into tears and would be unwilling or unable at that point to proceed." (J.A.

[6] Justin Peeples was born on June 3, 1982. (State's Exhibit D: Tr. 3/20/87, at 17).



41). To avoid impairing Justin's ability to communicate and to maximize the opportunity to adduce the child's testimony, it would be necessary "to remove the threatening agent which he perceives as Mrs. Craig." (J.A. 41).

Jessie Sue Smith, age four,[7] had been in counseling with Ms. Burke for approximately thirty-six sessions. (J.A. 41). This young child also perceived Craig as having threatened her life and the lives of her parents and her sibling. (J.A. 43). As Ms. Burke testified:

> She believes that that—Mrs. Craig is capable and willing to carry out those threats at home and Jessie is fearful of this person. I believe that that fear would impair her ability to sit in front of that person or to be in the same room with that person, would be unable to discuss or to share with the required individuals that information which she has to share regarding these allegations.

(J.A. 43). Ms. Burke added that it "would be a stepback for Jessie to have to face this person." (J.A. 43).

Dr. Gladys Sweeney, a licensed psychologist,[8] testified about five-year-old Drew Woodbury. (J.A. 49, 52).[9] She explained that she had seen Drew at ap-

[7] Jessie Sue Smith was born on April 2, 1982. (Exhibit D: Tr. 8/25/87, at 217).

[8] Dr. Sweeney held a Ph.D. in Counseling Psychology and a Master's Degree in Rehabilitation Counseling. (J.A. 49). She was formerly a faculty member of the Johns Hopkins School of Medicine's Department of Child Psychiatry. (J.A. 49-50).

[9] Drew Woodbury was born on August 22, 1981. (State's Exhibit A: Tr. 3/20/87, at 17).

proximately nineteen one-hour counseling sessions. (J.A. 52). Noting that Drew had experienced an "extreme level of high anxiety and distress" when talking about sexual abuse by Craig, Dr. Sweeney expressed the opinion that Drew's "ability to communicate would be grossly impaired if he were to testify in an open court in the presence of Mrs. Craig." (J.A. 54). Specifically, Dr. Sweeney noted that whenever Drew discusses the abuse, he exhibits "extreme regressive behavior, thumb sucking, you know, wanting the blanket, wanting clingingness, extreme dependency, all those kinds of behaviors." (J.A. 54). During cross-examination, Dr. Sweeney added that this behavior would be minimized and Drew's chances of communicating clearly would be enhanced if he were allowed to testify outside Craig's presence. (J.A. 55-57).

Anna Anderson-Hoover, a licensed clinical social worker,[10] testified that she had had fifteen therapy sessions with five-year-old Brian Endres,[11] each lasting one to one and one-half hours. (J.A. 21-22). She explained that Brian was "experiencing night terrors, nightmares about seeing Mrs. Craig" and had asked Hoover "and the police officers involved in this case not to see Mrs. Craig." (J.A. 24). Ms. Hoover also explained that "Brian has at times withdrawn into a fetal position when discussing the events" at Craig's center (J.A. 24), and that he suffers from panic dis-

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[10] Ms. Hoover held a Bachelor's Degree in Education and Psychology and a Master's Degree in both Child Development and Clinical Social Work. (J.A. 12). Sixty percent of Ms. Hoover's private practice was devoted to child victims of sexual abuse. (J.A. 13).

[11] Brian Endres was born on December 29, 1981. (State's Exhibit B: Tr. 3/20/87, at 17).



orders and an increasing level of anxiety (J.A. 22). When asked how Brian would react to a face-to-face confrontation with Craig, Ms. Hoover expressed the opinion that Brian would experience severe emotional distress and would be unable to communicate exactly what had happened to him. (J.A. 22-23).

Following argument of counsel, the hearing court rejected Craig's contention that her Sixth Amendment right of confrontation would be violated by use of the closed-circuit television procedure. (J.A. 59-67). The court ruled that the requisite predicate showings had been made as to each child:

> There's been evidence presented and based upon the evidence presented I find that the testimony of each of these children in a courtroom will result in each child suffering serious emotional distress and such that each of these children cannot reasonably communicate and accordingly I believe that there's a need and its [sic] appropriate to direct that the testimony of these children be provided by way of closed circuit television consistent with the provisions of Section 9-102 assuming that the child's deemed to be competent to testify and the child's testimony is relevant and of course not otherwise objectionable and assuming those two predicates are met, that is that the child is determined to be competent and that the subject matter of the child's testimony is relevant and not otherwise objectionable, each of the children referred to in the evidence will be permitted to testify by means of closed circuit television

consistent with the procedure set forth in Section 9-102.

(J.A. 66-67).

Trial commenced in March of 1987. (J.A. 1). As part of its case in chief, the State called the five child victims who had been the subjects of the pre-trial hearing. Brian Endres could not testify at trial, because he was so uneasy that he refused to enter the judge's chambers for questioning on the issue of competency. (Tr. 3/20/87, at 82-83). The remaining four children, Brooke Etze, Drew Woodbury, Jessie Sue Smith, and Justin Peeples, testified via closed-circuit television, but only after they had been examined for competency in the trial judge's chambers.[12]

The closed-circuit television procedure was as follows: Craig and one of her two trial counsel remained in the courtroom with an Assistant State's Attorney, the judge, and the jury, while Craig's other trial counsel and another Assistant State's Attorney were located in the judge's chambers with the child witness and a technician. (J.A. 88). Craig and defense counsel in the courtroom were able to communicate privately with Craig's counsel in the judge's chambers by telephone, and a procedure was available for making and ruling on objections. (J.A. 88-89). Testimony was

[12] Each competency evaluation, including the aborted one of Brian Endres, as well as each child's trial testimony, is memorialized on videotape and in transcript form. (Brooke Etze - Court Exhibit 1: J.A. 160; J.A. 74-80, 89-153; Drew Woodbury - Court Exhibit 2: Tr. 3/20/87, at 80; J.A. 164-74, 176-96; Jessie Sue Smith - Court Exhibit 4: J.A. 242-43; J.A. 197-207, 217-42; Justin Peeples - Court Exhibit 5: J.A. 270-71; J.A. 244-70; Brian Endres - Court Exhibit 3: Tr. 3/20/87, at 90-91; Tr. 3/20/87, at 80, 82-83).



broadcast into the courtroom where everyone could see and hear it on two monitors. (J.A. 89).

The four child victims said that Craig had sexually abused them. Brooke related that Craig had kicked her in her "privates" and had touched her with a stick between her legs on numerous occasions. (J.A. 94-95). The three other children testified that Craig had perpetrated various other sexual abuses on them. Justin said that Craig had "poked" him in the "hiney" with a screwdriver (J.A. 259); Drew related that Craig had placed "something cold in [his] behinney" (J.A. 178); and Jessie recounted that Craig had touched her in her "private places" (J.A. 223).

The children's testimony was corroborated by expert medical evidence from Dr. Charles Shubin, a clinical pediatrician specializing in the field of child sexual abuse. (Tr. 3/17/87, at 131-61). Dr. Shubin, who had examined the four children, explained that all of the children exhibited healed scars in the posterior part of their bodies. (Tr. 3/17/87, at 165-79; Tr. 3/23/87, at 2-21). It was Dr. Shubin's opinion that the pattern of injuries to the genital and anal areas of the child victims was remarkably consistent and required the forcing of an object into a body opening. (*Id.*).[13]

[13] Brooke Etze's testimony was also corroborated, in part, by testimony from eight-year-old Amanda Jones. Amanda, who had attended Craig's center at the same time as Brooke, said that during daily naptimes, Brooke would go upstairs to Craig's office. Brooke would look sad when she went upstairs and would be crying when she returned. Amanda also described threats about loss of parental love that were made by Craig in Brooke's presence. (Tr. 3/17/87, at 78-89). Because Amanda did not claim to have been abused by Craig, she was not eligible to testify via closed-circuit television. *See* Md. Cts. & Jud. Proc. Code Ann. § 9-102(a)(1) (1989 Repl. Vol.).

The defense presented forty-one witnesses: among these were numerous character witnesses, Craig herself, and Dr. Lawrence Wisso, a pediatrician and faculty member at the Johns Hopkins Hospital. Dr. Wisso, who had examined Brooke Etze one month before trial, explained that he had observed no scarring, but that his examination was hindered because Brooke was suffering from a urinary tract infection. (Tr. 3/26/87, at 172, 175, 179, 183-84). He also said that his examination could not rule out the possibility that Brooke had been sexually abused. (*Id.* at 191). Although Dr. Wisso had examined the three other children who testified via closed-circuit television, his testimony did not address his findings as to these children. (Tr. 2/3/87, at 44-52; Tr. 3/18/87, at 137-38; Tr. 3/26/87, at 172-93).

On April 2, 1987, the jury found Craig guilty of all counts. (J.A. 2). Sentencing was deferred, by a series of post-trial motions, until September 21, 1987. (J.A. 2). On that date, and prior to being sentenced, Craig urged the trial court to reverse its ruling on the use of closed-circuit television, citing a new decision in which the Court of Appeals of Maryland had interpreted Section 9-102 for the first time. (J.A. 272-78, 283-91).[14] With the benefit of both this decision and hindsight as to the entire trial, the court affirmed its pre-trial ruling. (J.A. 292-93). It then sentenced Craig to ten years' imprisonment, but granted Craig's request to remain at liberty pending appeal. (Tr. 9/21/87, at 58-59, 61-66).

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[14] See *Wildermuth v. State*, 310 Md. 496, 530 A.2d 275 (decided September 10, 1987).



On appeal, the Court of Special Appeals of Maryland affirmed the trial court's judgment. (Pet. App. 22a-69a). The Court of Appeals of Maryland, reviewing the case on certiorari, reversed Craig's convictions. (Pet. App. 1a-21a). Relying on the Sixth Amendment's Confrontation Clause[15] as construed in *Coy v. Iowa*,[16] the court ruled that the closed-circuit television procedure "ordinarily cannot be invoked unless the child witness initially is questioned (either in or outside the courtroom) in the defendant's presence, and is found by the judge who presided at this procedure to be unable to 'reasonably communicate' because of 'serious emotional distress' produced by the presence of the defendant." (Pet. App. 16a). Because the four children who had testified by closed-circuit television had not been questioned preliminarily in Craig's presence, the Court of Appeals reversed, saying: "[A]s we read *Coy*, the showing made by the State was insufficient to reach the high threshold required by that case before § 9-102 may be invoked." (Pet. App. 3a).

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[15] Although the court's opinion contains passing references to Article 21 of the Maryland Declaration of Rights, a provision that is virtually identical to the federal Confrontation Clause, it is clear that the Court of Appeals believed federal law compelled its conclusion. In any event, Maryland's high court did not indicate that Article 21 provides rights "distinct from, or broader than, respondent's rights under the Sixth Amendment." *Kentucky v. Stincer*, 482 U.S. 730, 735 n.7 (1987). Accordingly, the decision does not rest on an adequate and independent state ground. *Id.*

[16] 487 U.S. ___, 108 S.Ct. 2798 (1988).

## SUMMARY OF ARGUMENT

The problems attendant to the detection, investigation, and prosecution of child abuse are of immense concern to the States. In an effort to ensure that child abusers are prosecuted, and at the same time lessen the trauma that young victims suffer during the criminal trial process, many state legislatures have enacted laws providing for protective measures such as one- and two-way closed-circuit testimony, videotaped testimony, and hearsay exceptions for certain out-of-court statements of child victims. In the wake of *Coy*, doubt exists as to when these ameliorative devices can be used consistently with the Sixth Amendment.

Although the Confrontation Clause reflects a preference for in-court testimony and for full and effective cross-examination, it has never been interpreted literally by this Court. Over the past century, this Court consistently has ruled that reliable hearsay is admissible and that the cross-examination right merely guarantees the opportunity to cross-examine a witness. Even after *Coy*, the Confrontation Clause need not be read literally, so long as compelling state interests exist and case-specific findings of necessity are made.

Two compelling state interests justify the use at trial of child-protective measures such as the one-way closed-circuit television procedure employed in this case: (1) the need to protect particularly vulnerable child victims from the trauma of testifying in the physical presence of the accused; and (2) the need to ensure that child abusers are brought to trial and that the testimony of child abuse victims is considered



by the fact-finders in ensuing prosecutions. As required by *Coy* and Maryland's statutory procedure, the trial court here made appropriate case-specific findings regarding the special need to use closed-circuit testimony, determining that the four young children were effectively unavailable to testify in the open courtroom in Craig's presence. The Maryland Court of Appeals erred, therefore, in ruling that the Confrontation Clause required the child victims to be subjected to the trauma of facing Craig before they could be deemed in need of special protection from that same trauma.

## ARGUMENT

### WHERE CASE-SPECIFIC FINDINGS REGARDING THE NEED TO PROTECT CHILD VICTIMS ARE MADE AND THE WITNESSES, AGES FOUR TO SIX, ARE SUBJECTED TO CROSS-EXAMINATION AT TRIAL, THE SIXTH AMENDMENT'S CONFRONTATION CLAUSE DOES NOT REQUIRE A FACE-TO-FACE MEETING BETWEEN THE WITNESSES AND THE ACCUSED BEFORE A ONE-WAY CLOSED-CIRCUIT TELEVISION PROCEDURE IS USED.

#### A. Child abuse prosecutions present unique problems, and the States have responded by enacting various child-protective procedures.

During the last decade, society began to realize that a large number of its children are victims of physical and sexual abuse.[17] It also began to realize that the

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[17] *See* American Association for Protecting Children, *Highlights of Official Child Neglect and Abuse Reporting 1985* 3, 18 (1987) (indicating that, between 1976 and 1985, annual reports of child maltreatment made to designated public agencies jumped from

child victimized by abuse is traumatized further when required to participate in the prosecution of her abuser.[18] And, it was readily apparent that without the child victim, who is often the only witness, child abuse cases frequently would go unprosecuted. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987).[19] Fueled by these realizations, the States began to re-examine the traditional, adult-modeled, criminal justice system, which generally requires all witnesses in a criminal case to testify under oath in a public courtroom in the physical presence of the defendant.

To date, a substantial majority of state legislatures have enacted a variety of laws that seek to accommodate the unique needs of child victims. Twenty-one states now have provisions allowing for use of one-way closed-circuit televisions, one-way screens, or one-

669,000 to 1.9 million reports, with approximately 11.7% of the 1985 cases involving allegations of sexual abuse); American Bar Association, *Guidelines for the Fair Treatment of Child Witnesses in Cases Where Child Abuse Is Alleged* 7 (1985) (indicating that as many as one in every three female adults was sexually abused as a child).

[18] Bjerregaard, *Televised Testimony as an Alternative in Child Sexual Abuse Cases*, 25 Crim. L. Bull. 164, 169-70 (1989); Foreman, *To Keep the Balance True: The Case of* Coy v. Iowa, 40 Hastings L.J. 437, 439 (1989); Hill & Hill, *Videotaping Children's Testimony: An Empirical View*, 85 Mich. L. Rev. 809, 819-21 (1987); Parker, *The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?*, 17 New. Eng. L. Rev. 643, 648-53 (1982); Smith, *The Young Victim as Witness for the Prosecution: Another Form of Abuse?*, 89 Dick. L. Rev. 721, 732 (1985).

[19] *Accord* Foreman, *supra* note 18, at 437-39; Smith, *supra* note 18, at 731. *See also* Note, *Sexually Abused Children: The Best Kept Legal Secret*, 3 N.Y.L. Sch. Hum. Rts. Ann. 441, 446 (1986) ("It is estimated that only 24% of all cases nationwide result in criminal actions." (footnote omitted)).



way mirrors.[20] Six states authorize the use of two-way closed-circuit televisions.[21] Two states provide for both one- and two-way closed-circuit televised testimony.[22] Thirty-five states allow preservation of a child's testimony on videotape for later use at trial or permit out-of-court statements of children pursuant to hearsay exception provisions. See Pet. App. 71a-74a. Additionally, the United States Congress is currently considering legislation that would permit the use, at trial, of two-way closed-circuit television, videotaped depositions, and a child's hearsay statements.[23]

[20] Ala. Code § 15-25-3 (Supp. 1988); Alaska Stat. § 12.45.046 (Supp. 1988); Ariz. Rev. Stat. Ann. § 13-4253 (Supp. 1988); Conn. Gen. Stat. Ann. § 54-86g (West Supp. 1989) (amended by Conn. Pub. Act 89-177 (1989)); Fla. Stat. § 92.54 (West Supp. 1989); Ga. Code Ann. § 17-8-55 (Supp. 1989); Ill. Ann. Stat. ch. 38, para. 106A-3 (Smith-Hurd Supp. 1989); Ind. Code Ann. § 35-37-4-8 (Burns Supp. 1989); Iowa Code Ann. § 910A.14 (West Supp. 1989); Kan. Stat. Ann. § 22-3434 (1988); Ky. Rev. Stat. Ann. § 421.350 (Baldwin Supp. 1989); La. Rev. Stat. Ann. § 15:283 (West Supp. 1989); Md. Cts. & Jud. Proc. Code Ann. § 9-102 (1989 Repl. Vol.); Mass. Gen. Laws Ann. ch. 278, § 16D (West Supp. 1989); Mich. Comp. Laws Ann. § 600.2163a (West 1988); N.J. Stat. Ann. § 2A:84A-32.4 (West Supp. 1989); Okla. Stat. Ann. tit. 22, § 753 (West Supp. 1989); Pa. Cons. Stat. Ann. tit. 42, § 5985 (Purdon Supp. 1989); R.I. Gen. Laws § 11-37-13 (Supp. 1988); Tex. Crim. Proc. Code Ann. art. 38.071 (Vernon Supp. 1989); Utah Code Ann. § 77-35-15.5 (Supp. 1989).

[21] Cal. Penal Code § 1347 (West Supp. 1989); Haw. R. Evid. 616; Idaho Code § 19-3024A (1989); N.Y. Crim. Proc. Law §§ 65.00-.30 (McKinney Supp. 1989); Ohio Rev. Code Ann. § 2907.41 (Page 1987); Va. Code Ann. § 18.2-67.9 (1988).

[22] Minn. Stat. Ann. § 595.02 (West 1988); Vt. R. Evid. 807.

[23] See S. 1923, 101st Cong., 1st Sess. (1989); S. 1965, 101st Cong., 1st Sess. (1989).

In the wake of this Court's decision in *Coy v. Iowa*, 487 U.S. ___, 108 S.Ct. 2798 (1988), many of these provisions have been attacked on the ground that they deny a defendant's constitutional right to confrontation. Without doubt, the *Coy* Court recognized that the Confrontation Clause expresses a strong preference for face-to-face in-court encounters between the accused and the witnesses against him. 108 S.Ct. at 2800-02. Nonetheless, it expressly left open the question of when, if ever, the Confrontation Clause permits an exception for the employment of a procedure like the one-way closed-circuit television device that was used by the child victims in this case. *Id.* at 2803. Given the purposes of the Confrontation Clause and this Court's decisions over the past century, use of one-way closed-circuit testimony is constitutionally permissible if based on case-specific findings of special need like those made by the trial court here.

**B. The Confrontation Clause should not be construed literally.**

The primary object of the Sixth Amendment's Confrontation Clause was to eradicate the practice of trial by affidavit and deposition, and to allow the accused to examine personally the witnesses against him. *E.g.*, *Barber v. Page*, 390 U.S. 713, 721 (1968); *Mattox v. United States*, 156 U.S. 237, 242-43 (1895). Although the Clause contains the word "confront," and this Court has said that that word means "face to face," the Clause itself has never been construed as categorically guaranteeing a face-to-face encounter between every defendant and his accusers. When the necessities of a given case so require, this Court has determined that something less than physical confrontation will satisfy the Sixth Amendment.



Indeed, in its earliest cases, this Court eschewed a literal interpretation of the Confrontation Clause. *Mattox v. United States*, 156 U.S. at 240-44 (former testimony of witness admitted at subsequent trial, where witness had since died); *Kirby v. United States*, 174 U.S. 47, 61 (1899) (dying declarations admissible); *Motes v. United States*, 178 U.S. 458, 472 (1900) (recognizing in dicta that defendant who is responsible for absence of witness cannot claim right to confront); *Dowdell v. United States*, 221 U.S. 325, 330 (1911) (stating in dicta that Confrontation Clause "has always had certain well-recognized exceptions"); *Salinger v. United States*, 272 U.S. 542, 548 (1926) (acknowledging that confrontation right was not intended to abrogate common law exceptions to hearsay rule). *See also Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934) (recognizing in dicta that federal privilege of confrontation has not at any time been without exceptions and that even exceptions are not static and may be enlarged from time to time); *West v. Louisiana*, 194 U.S. 258, 263-67 (1904) (relying on federal Sixth Amendment cases to hold that use of absent witness's deposition did not deprive defendant of due process).

And, since holding twenty-five years ago in *Pointer v. Texas*, 380 U.S. 400, 406 (1965), that the Sixth Amendment's Confrontation Clause was applicable to the States through the Fourteenth Amendment, the Court has continued to reaffirm that the Clause need not be literally interpreted in every case. Even though the Court has, since *Pointer*, categorized confrontation cases into two broad groups—cases involving the admission of out-of-court statements, *e.g.*, *Bourjaily v. United States*, 483 U.S. 171 (1987); *United States*

*v. Inadi*, 475 U.S. 387 (1986); *Ohio v. Roberts*, 448 U.S. 56 (1980); *Dutton v. Evans*, 400 U.S. 74 (1970); *California v. Green*, 399 U.S. 149 (1970), and cases involving restrictions on the scope of cross-examination, *e.g.*, *Olden v. Kentucky*, 488 U.S. ___, 109 S.Ct. 480 (1988) (per curiam); *United States v. Owens*, 484 U.S. 554 (1988); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *Delaware v. Fensterer*, 474 U.S. 15 (1985) (per curiam); *Davis v. Alaska*, 415 U.S. 308 (1974)—the Court's decisions continue to illustrate that the right of confrontation is not absolute when the necessities of the case so demand.[24]

Nothing in *Coy v. Iowa*, this Court's most recent case involving the Confrontation Clause, overruled the scores of confrontation cases that have been decided over the course of the last one hundred years. While the majority opinion in *Coy* emphatically stressed the importance of face-to-face confrontation, it did not say that what had previously been viewed as a preference

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[24] Insofar as the Confrontation Clause has been construed as not conferring an absolute right, it has not been treated differently than other clauses of the Sixth Amendment. The right to compulsory process does not prohibit absolutely the exclusion of a defense witness whose identity is not disclosed as required by a state's discovery rule. *Taylor v. Illinois*, 484 U.S. 400 (1988). The right to effective assistance of counsel does not guarantee a defendant the right to consult with counsel during a brief trial recess. *Perry v. Leeke*, 488 U.S. ___, 109 S.Ct. 594 (1989). The fair-cross-section requirement does not guarantee a representative jury in a particular case. *Holland v. Illinois*, 493 U.S. ___, 110 S.Ct. 803 (1990). The right to a speedy trial does not guarantee a trial date within a specified period of time. *Barker v. Wingo*, 407 U.S. 514 (1972). And, the right to a jury trial does not apply where a defendant is charged with a petty offense. *Blanton v. City of North Las Vegas*, 489 U.S. ___, 109 S.Ct. 1289 (1989).



must now be viewed as an absolute right. 108 S.Ct. at 2800-03. Instead, the majority opinion merely recognized that (1) if exceptions to face-to-face confrontation do exist, they must be necessary to further an important public policy; and (2) where a procedure calling for less than face-to-face confrontation is not firmly rooted in our legal tradition, the necessity for such must be shown on a case-by-case basis. *Id.* at 2803.

Given what the *Coy* Court did and did not say, there has been no marked departure from this Court's earlier decisions regarding the Confrontation Clause. Even after *Coy*, the Clause does not demand face-to-face confrontation in a given case, so long as the necessity for less is supported by the record and furthers an important or well-established public interest. As explained in the next section of this brief, the use of Maryland's one-way closed-circuit television procedure furthers several important public interests, and its use in this case was amply supported by case-specific findings of necessity. Nonetheless, Maryland's high court misread *Coy* and condemned a procedure, which, under a proper construction of the Confrontation Clause, demands approval.

### C. Maryland's one-way closed-circuit television procedure furthers the public interests of protecting children and of effective law enforcement, and the need to use the procedure in this case was amply established.

#### 1. Several compelling interests are furthered by the use of the one-way closed-circuit television procedure.

Time and time again, this Court has recognized that children are vulnerable and need special protection. *Prince v. Massachusetts*, 321 U.S. 158 (1943) (up-

holding statute prohibiting girls under eighteen and boys under twelve from exercising any trade on public street); *Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding statute restricting sale of adult magazines to children); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (plurality opinion) (upholding restrictions on indecent broadcasting during day-time hours when children could hear it); *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) (plurality opinion) (recognizing state's compelling interest in protecting confidentiality of records concerning child abuse); *Baltimore City Department of Social Services v. Bouknight*, 58 U.S.L.W. 4184 (U.S. Feb. 20, 1990) (recognizing juvenile court's interest in child safety). Indeed, in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607-08, 611 n.27 (1982), this Court recognized that minor victims of sexual abuse may well need to be protected from trauma in the courtroom setting itself. And, four Justices of this Court have said that protection of child witnesses is sufficiently compelling to permit something less than face-to-face confrontation. *Coy v. Iowa*, 108 S.Ct. at 2805, 2809 (O'Connor, J., concurring, joined by White, J.; Blackmun, J., dissenting, joined by Rehnquist, C.J.).[25]

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[25] A number of state courts, including the Maryland Court of Appeals in the instant case, have concluded, as did the concurring and dissenting Justices in *Coy*, that the compelling interest of protecting a child witness can outweigh a defendant's right to meet his accuser face to face. *E.g., State v. Vincent*, 159 Ariz. 418, 768 P.2d 150 (1989) (en banc); *People v. Thomas*, 770 P.2d 1324 (Colo. Ct. App. 1988) (cert. granted by Colo. Sup. Ct. on March 13, 1989); *State v. Bonello*, 210 Conn. 51, 554 A.2d 277, *cert. denied*, ___ U.S. ___, 109 S.Ct. 2103 (1989); *Glendening v. State*, 536 So.2d 212 (Fla. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 3219 (1989); *Ortiz v. State*, 188 Ga. App. 532, 374 S.E.2d 92, *cert. denied*, 188 Ga. App. 912 (1988); *Brady v. State*, 540 N.E.2d 59 (Ind. Ct. App. 1989); *State v. Hoversten*, 437 N.W.2d 240 (Iowa), *cert. denied*, ___ U.S. ___, 110 S.Ct. 212 (1989); *State v. Chisholm*, 245 Kan. 145, 777 P.2d 753 (1989); *State v. Presley*, 542 So.2d 1171 (La. App. 1989); *State v. Conklin*, 444 N.W.2d 268 (Minn. 1989) (en banc); *State v. Crandall*, 231 N.J. Super. 124, 555 A.2d 35, *cert. granted*, 117 N.J. 143, 564 A.2d 866 (1989); *State v. Tafoya*, 108 N.M. 1, 765 P.2d 1183 (Ct. App.), *cert. denied*, 107 N.M. 785, 765 P.2d 758 (1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1572 (1989); *People v. Cintron*, ___ N.Y.2d ___, ___ N.Y.S.2d ___, ___ N.E.2d ___ (1990); *State v. Eastham*, 39 Ohio St.3d 307, 530 N.E.2d 409, 412 (1988) (concurring opinion); *State v. Taylor*, 562 A.2d 445 (R.I. 1989); *State v. Thomas*, 150 Wis.2d 374, 442 N.W.2d 10, *cert. denied*, ___ U.S. ___, 110 S.Ct. 188 (1989). *But see State v. Murray*, 375 S.E.2d 405 (W. Va. 1988).



Of course, it is not only the prospect of testifying in a courtroom open to the public that is terrifying to a child victim. Having to face an adult authority figure who has been both physically and psychologically abusive is especially torturous for a child. For example, in this case Ms. Burke testified that Brooke Etze perceived Craig as having threatened her life and the lives of her parents. (J.A. 39). To a young child such as Brooke, such threats are very real. The child simply cannot be expected to understand that past threats of physical harm cannot be carried out in an open courtroom. After all, a six-year-old child is not a miniature adult; a young child lacks an adult's defense mechanisms and may be permanently damaged by having to face her abuser in the courtroom.

Studies have shown that the courtroom experience, particularly the experience of coming into the courtroom and facing the accused, is associated with increased behavioral disturbances in the already

traumatized child. *See Coy v. Iowa*, 108 S.Ct. at 2808-09 (Blackmun, J., dissenting); note 18, *supra*. Given this Court's prior recognition that children are vulnerable individuals who need to be treated differently, the State has a legitimate interest in ensuring that children be shielded from the further torment associated with testifying in an open courtroom in the defendant's presence. The State should not be forced to ignore the concerns of victims, especially young victims who are called upon to give public testimony about the humiliating and degrading experience of being sexually abused. *See United States v. Hasting*, 461 U.S. 499, 507 (1983); *Morris v. Slappy*, 461 U.S. 1, 14 (1983).

In addition to its interest in protecting the once victimized child from additional trauma, the State has the separate, and equally compelling, interest in seeing that those who prey upon children are brought to justice. Because a child abuse prosecution is so heavily dependent upon the testimony of the victim, if the victim is unable to testify in the courtroom and the alternative of a protective device such as closed-circuit television is unavailable, the prosecution may be thwarted entirely. If this occurs, the terrible risk envisioned by the intermediate appellate court in this case could well become reality: "[T]he truth of the matter may never be revealed, a terrible crime might go unredressed, and a dangerous person might be turned loose to continue his or her predation, perhaps (and, in some instances, likely) upon the same helpless victim." (Pet. App. 53a-54a).

This second interest, which has been variously characterized as the interest in effective law enforcement, *e.g., Ohio v. Roberts*, 448 U.S. at 64; *Richardson v.*



*Marsh*, 481 U.S. 200, 210 (1987); *Lee v. Illinois*, 476 U.S. 530, 557 (1986) (Blackmun, J., dissenting); the interest in the truth-determining process, *e.g., United States v. Inadi*, 475 U.S. at 396; *Tennessee v. Street*, 471 U.S. 409, 415 (1985); and the interest in the integrity of the fact-finding process, *e.g., Bourjaily v. United States*, 483 U.S. at 182; *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973), comprises the touchstone of the Confrontation Clause and, indeed, the entire legal system. *See James v. Illinois*, 493 U.S. ___, 110 S.Ct. 648, 651 (1990) (quoting *United States v. Havens*, 446 U.S. 620, 626 (1980)) (" 'There is no gainsaying that arriving at the truth is a fundamental goal of our legal system.' "). Consonant with this core precept of the Confrontation Clause, this Court has allowed hearsay testimony, despite the absence of the declarant, *e.g., Ohio v. Roberts*, 448 U.S. at 74-77; and, it has permitted an available witness to testify, despite the fact that cross-examination was curtailed by the witness's memory loss, *e.g., United States v. Owens*, 484 U.S. at 555-64.

Consonant with this same core precept, the victim of child abuse who is "unavailable" to face the accused, but who is otherwise available for full cross-examination, should be permitted to testify via one-way closed-circuit television. The State, like the criminal defendant, is entitled to a fair trial. *See Batson v. Kentucky*, 476 U.S. 79, 107 (1986) (Marshall, J., concurring); *Snyder v. Massachusetts*, 291 U.S. at 122; *Hayes v. Missouri*, 120 U.S. 68, 70 (1887). Although the right of confrontation runs to the defendant, and not to the State, the goal it expresses is the disclosure of truth and the attainment of a just verdict. *See Holland v. Illinois*, 493 U.S. ___, 110 S.Ct. 803, 809

(1990). To force the State to forgo its legitimate interest in prosecuting child molesters, simply because the child victim is unable to come face to face with her abuser, exacts a price that the Sixth Amendment should not demand.

Coincidentally, the use of closed-circuit television, in addition to being the only vehicle for adducing a child's testimony in a given case, may actually enhance the truthfulness of the child's evidence. *See, e.g., Coy v. Iowa*, 108 S.Ct. at 2809 n.5 (Blackmun, J., dissenting); *Nelson v. Farrey*, 874 F.2d 1222, 1230 (7th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 835 (1990); *State v. Sheppard*, 197 N.J. Super. 411, 416, 484 A.2d 1330, 1332 (1984); Bjerregaard, *supra* note 18, at 170-71; Hill & Hill, *supra* note 18, at 813-17; Smith, *supra* note 18, at 742; *The Supreme Court, 1987 Term: Leading Cases*, 102 Harv. L. Rev. 143, 157 (1988). While adults may be more likely to tell the truth when forced to look the accused in the eye, the trauma of facing her attacker may well cause the molested child to become confused and unable to tell the truth. *Cf. Perry v. Leeke*, 488 U.S. ___, 109 S.Ct. 594, 606 & n.6 (1989) (Marshall, J., dissenting) (noting increased likelihood of child-like witness's stating the truth had he had a few soothing words from counsel during courtroom recess). Because the testimony that comes to the fact-finder via one-way closed-circuit television may well be more truthful than whatever testimony, if any, might be adduced in open court, it is preferred. *Cf. United States v. Inadi*, 475 U.S. at 394-96 (co-conspirator's out-of-court statement during course of conspiracy may be more reliable than declarant's in-court testimony).[26] Without doubt, the

[26] Consonant with this reasoning, one-way closed-circuit television may well provide more accurate testimony than would a procedure using two-way closed-circuit television. Because the two-way procedure does not eliminate the psychological trauma that results from seeing the victimizer, the Maryland Court of Appeals' suggestion that this procedure is preferable (Pet. App. 16a-17a), cannot withstand scrutiny. If, as Justice O'Connor has suggested, a two-way procedure does not even present a confrontation problem, *Coy v. Iowa*, 487 U.S. ___, 108 S.Ct. 2798, 2804 (1988) (O'Connor, J., concurring), then this would be because it achieves the same effect as a face-to-face meeting.



State has a legitimate interest in bringing the preferred testimony before the fact-finder.

**2. The use of one-way closed-circuit television by the child victims was based on appropriate case-specific findings of necessity.**

Unlike the Iowa statute at issue in *Coy*, the Maryland statute governing the use of one-way closed-circuit television requires case-specific findings that the child victim needs the statute's special protection. Before allowing one-way closed-circuit testimony to be used here, the court had to find that each of the four child victims would suffer "serious emotional distress"; it also had to find that such distress would result in the child's being unable reasonably to communicate.

Although the *Coy* decision does not explain what factors a trial court should take into account when making a case-specific finding of necessity, this Court, in an analogous situation, has provided guidance. In *Globe Newspaper*, the Court held that a state could not mandate that the courtroom *always* would be closed to the public during the testimony of child sexual assault victims. 457 U.S. at 607-08. The Court did, however, indicate that closure might occur in a

particular case, if the trial court found that it was necessary after considering factors such as the victim's age, the victim's psychological maturity and understanding, the nature of the crime, and the desires of the victim and the victim's parents. *Id.* at 608. Here, the trial court was able to take into account similar factors before concluding that the child victims needed the closed-circuit television procedure to protect their physical and psychological well-being.

In the first instance, the court knew that the witnesses were only four to six years of age, a factor weighing heavily in favor of special protection. And, at a two-day pre-trial hearing, the court heard from highly qualified experts who had long-standing and well-developed relationships with the children. These experts, who, unlike the trial court, were specially trained to deal with abused children and their traumas, offered detailed evidence regarding why each child victim would be unable to face Craig.

For example, Ms. Burke testified that Brooke Etze firmly believed that her life and the lives of her parents and her pet were in actual danger from Craig. (J.A. 39). Ms. Burke expressed the opinion that Brooke would curl up in a ball and be unable to testify in Craig's presence. (J.A. 44). According to the therapists who treated Justin Peeples, Jessie Sue Smith, and Drew Woodbury, these children would be incapable of discussing the abuse that they had suffered, if forced to do so in Craig's presence. (J.A. 41, 43, 54). And, because Craig made a post-trial objection to the use of closed-circuit testimony, the court had the added benefit of considering its decision in the light of, among other things, the children's competency evaluations and their trial testimony.



The record here stands in stark contrast to the record that was before this Court in *Coy*. There, the Court was faced with a statute that categorically presumed unavailability.[27] No experts had testified before Coy's thirteen-year-old victims were allowed to shield themselves from Coy's visage. Indeed, no testimony or other evidence was offered to show that these victims, who were much older than the victims in this case, needed special protection from a physical confrontation with Coy.

Here, the use of the closed-circuit television procedure did nothing more than preclude a face-to-face meeting between the abused children and their abuser. Each child testified under oath and was subjected to full cross-examination by Craig's counsel. Additionally, unlike those jurors who are asked to consider a transcript of an unavailable declarant's prior testimony, *e.g.*, *Ohio v. Roberts*, 448 U.S. at 60, the jurors here were able to assess each child's demeanor through the use of monitors in the courtroom. Thus, the three primary guarantors of reliability—oath, cross-examination, and jury ability to observe demeanor—were present. *See Dutton v. Evans*, 400 U.S. at 88.

**3. The decision of the Court of Appeals of Maryland misconstrues the Confrontation Clause.**

Notwithstanding the fact that the record more than amply supported the trial court's findings of neces-

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[27] As it did in *Coy*, this Court has eschewed categorical presumptions in other contexts. *See Rock v. Arkansas*, 483 U.S. 44 (1987) (rejecting per se exclusion of hypnotically-refreshed testimony); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (invalidating mandatory court closure during testimony of minor victims of sexual assault).

sity, and notwithstanding the fact that the children were subjected to full and unrestricted cross-examination in the jury's view, the Maryland Court of Appeals held that the closed-circuit television procedure was improperly invoked because the children were not first compelled to confront Craig. By requiring such a meeting, Maryland's high court, under the guise of *Coy*, has engrafted onto the Sixth Amendment the unconscionable requirement that child victims of physical and sexual abuse be traumatized further before they can be deemed in need of special protection from trauma. Moreover, the procedure adopted by Maryland's high court imposes the intolerable risks that child abuse prosecutions will be aborted before they are ever begun and that less than truthful testimony will be adduced at trial. This procedure, which the *Craig* court referred to as "the high threshold required by [*Coy*] before § 9-102 may be invoked," (Pet. App. 3a), is not constitutionally mandated by the Confrontation Clause.

Contrary to what the Maryland Court of Appeals has said, the *Coy* decision did not establish a procedure that requires the already traumatized child victim to be further tormented. Nor did the *Coy* Court set out some, other, elaborate set of procedures to be followed before child-protective devices could be invoked.[28] Indeed, to have done so would have run

[28] In this regard, it matters not whether a state has adopted a one- or two-way closed-circuit television procedure, a procedure for videotaped testimony, or a new exception to the hearsay rule for child statements. So long as the state procedure permits the trial court to exercise discretion, as is true in Maryland, there is no reason for this Court to draft a comprehensive set of standards to guide discretion in every case. *See Taylor v. Illinois*, 484 U.S. at 414.



counter to this Court's long-standing policy of according great deference to a state's establishment and implementation of criminal trial rules and procedure. *See, e.g., Marshall v. Lonberger*, 459 U.S. 422, 438 n.6 (1983); *Patterson v. New York*, 432 U.S. 197, 201 (1977); *Chambers v. Mississippi*, 410 U.S. at 302-03. By construing the *Coy* decision as it did, the Court of Appeals mistakenly concluded that the Sixth Amendment unequivocally demands face-to-face confrontation. It does not.[29]

If left standing, the Court of Appeals' construction of the Confrontation Clause results in the following incongruity. Excited utterances and present sense impressions of child victims will be allowed into evidence because they fit within firmly-rooted exceptions to the hearsay rule. *See* Fed. R. Evid. 803(1)-(2); *Ohio v. Roberts*, 448 U.S. at 66. Yet, the live testimony of these same child victims will be prohibited, even though it could be subjected to full cross-examination, merely because the testimony could not be adduced in the open courtroom in the defendant's presence. Given that live testimony is the better, and thus the preferred, evidence, there can be no reason why, under the Sixth Amendment, child witnesses should not be allowed to give live testimony via a closed-circuit

[29] Maryland's high court also failed to take into consideration this Court's decision in *Kentucky v. Stincer*. Like the competency hearing at issue in *Stincer*, the hearing regarding use of a one-way closed-circuit television procedure does not involve questioning about the substance of the witness's testimony, but involves a collateral issue. *See* 482 U.S. at 740-41. Accordingly, under *Stincer* a defendant has no right to confront the child on the issue of whether a one-way closed-circuit television procedure should be allowed.

hookup, so long as case-specific findings of unavailability to testify in the courtroom have been made.

## CONCLUSION

The proper interpretation of the Confrontation Clause must "be determined in a given instance by a blend of historical understanding and adaptation of purpose to contemporary circumstances." *Williams v. Florida*, 399 U.S. 78, 124-25 (1970) (Harlan, J., concurring); *Ohio v. Roberts*, 448 U.S. at 64. It is not unreasonable to ask that technological advances, unknown in the eighteenth century, be used to protect a limited class of child victims—those who are so traumatized by the presence of their abusers that they are unable to testify in the courtroom. To permit these young children to present evidence from a judge's chambers does not endanger the Sixth Amendment rights of criminal defendants. The Confrontation Clause need not and should not be construed to deny child victims this small measure of security.



The State of Maryland therefore respectfully urges this Court to reverse the judgment of the Court of Appeals of Maryland.

Respectfully submitted,

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